No. 89-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PPG INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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The United States Environmental Protection Agency ("EPA" or "Agency") has filed an unnecessarily convoluted brief ("EPA Br.") that both gives the appearance of a record dispute and obfuscates the legal issues before the Court. This reply is submitted to clarify the important legal issues presented by PPG Industries, Inc.'s Petition ("Pet.").

I. THE COURT BELOW IMPROPERLY UPHELD LIMITATIONS THAT CANNOT BE ACHIEVED EVEN WITH USE OF THE EPA-DESIGNATED TECHNOLOGY.

A. EPA's Brief Provides No Support for the Fifth Circuit's Novel Construction of the Clean Water Act.

Conspicuously absent from EPA's brief is any discussion of the basic statutory standard upon which the validity of effluent limitations must be evaluated. The Clean Water

Act ("CWA" or "Act") specifically requires that "effluent limitations for categories and classes of point sources" be "achievable for such category or class." 33 U.S.C. § 1311(b)(2)(A). In establishing "effluent limitations guidelines," EPA must identify both the best available technology ("BAT") and "the degree of effluent reduction attainable" with BAT. 33 U.S.C. § 1314(b)(2)(A). Courts determine the validity of technology-based limitations (*i.e.* those based on BAT and those based on the best practicable technology ("BPT")) by analyzing whether those limitations can be achieved by the regulated plants through use of the EPA-designated technology. *See, e.g., Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 817-19 (9th Cir. 1980); *Tanners' Council of America v. Train*, 540 F.2d 1188, 1190-92 (4th Cir. 1976).

Because the Act requires that plants comply with the limitations all of the time, 33 U.S.C. § 1311(a); 40 C.F.R. § 122.41(a), and because "[p]lant owners should not be subject to sanctions when they are operating a proper treatment facility,"[1] EPA must promulgate limitations that can be consistently achieved by plants that properly use the EPA-designated technology.[2] For this reason, when limi-

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[1] *American Petroleum Institute v. EPA ("API II")*, 661 F.2d 340, 352 (5th Cir. 1981) (quoting *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976)).

[2] The implication in EPA's brief at 13 n.15, that EPA need not demonstrate that 100% compliance with the limitations is possible, is unsupported by any case law, including the two cases upon which the Agency relies, *American Petroleum Institute v. EPA ("API I")*, 540 F.2d 1023 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), and *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975). In *API I*, the court upheld the limitations despite the 90%, 80% and 70% compliance rates of the plants in the record because "EPA concluded that any failures to meet the limitations were due to improperly operated filters or use of filters beyond design capacity." 540 F.2d at 1034. In *American Meat*, the court upheld the limits despite less-than-100% compliance from the four plants in the data base *because those plants had not yet installed the EPA-designated technology*, two such

tations for numerous compounds in the affected plants' wastestreams are based on use of a single technology, that technology must be able to reduce simultaneously *all* of the regulated compounds to or below the levels established by the Agency.

Unfortunately, the court below did not address whether any one plant (much less all plants in the OCPSF industry) could comply with the entire set of steam stripping limitations, deeming this factor "irrelevant." Had the court below conducted the required analysis, it would have remanded the steam stripping limitations, because no plant—not even the two "best" plants on whose performance the limitations are based—can comply with those limitations.[3] As EPA admits, EPA Br. at 14-16, the court instead determined the validity of the steam stripping limitations based on the performance of different plants treating different compounds.

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plants complied much of the time *without* the EPA-designated technology, and two others "could apparently meet the standards easily by adding the [EPA-designated technology]." 526 F.2d at 458. The facts upon which *API I* and *American Meat* were based undisputedly are absent here; EPA has unequivocally stated that both PPG Plant 913 and Dow Plant 415 "us[ed] best available technology appropriately." Pet. App. at 259a.

[3] EPA tries to minimize the significance of the exceedances at PPG Plant 913 and Dow Plant 415 by characterizing them as slight, even though the CWA does not provide an exception for "slight" exceedances. EPA also tries to minimize the relevance of these exceedances by describing them as only 2 out of 308 data points. EPA Br. at 8-9 & n.11. However, the 308 data points were for all 12 compounds in the wastestreams at both plants. Dow Plant 415 had but 15 data points for trichloroethylene ("TCE") of which 1 (or 7%) exceeded the limitations. PPG Plant 913 had but one data point reflecting that plant's chloroform average, and this data point exceeded the chloroform monthly average limitation, reflecting 100% noncompliance. *See United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1045 (W.D. Mo. 1984) (violation of a pollutant's monthly average limitation held to constitute a violation for every day in the month). The remaining 292 data points are irrelevant in determining the achievability of the TCE and chloroform limitations.

In essence, the court found that, as a matter of law, as long as some of the plants in the industry can successfully treat some of the compounds, then *à fortiorari* all of the plants can successfully treat all of the compounds. Neither the court below nor EPA in its brief provided any statutory analysis in support of this illogical conclusion. Indeed, EPA does not deny that, as PPG set forth in its Petition at 11 n.3, the court's statutory interpretation was based exclusively on a *post hoc* rationalization asserted by the Department of Justice at oral argument, and thus is entitled no deference.

B. The Fifth Circuit's Opinion Creates a Conflict Among the Circuits.

Notwithstanding the Fifth Circuit's explicit recognition that its decision conflicted with the Fourth Circuit's decision in *Tanners' Council*, EPA claims that *Tanners' Council* can be distinguished because it involved BPT rather than BAT limitations and because it involved data transfer issues not present here. EPA Br. at 16-17. The first distinction is immaterial; both BPT and BAT limitations must be achievable by the affected plants through use of the EPA-designated technology. *Cf.* 33 U.S.C. § 1311(b)(1)(A)-(2)(A) *with* 33 U.S.C. § 1314(b)(1)-(2). Data transfer and other methodological issues similarly are irrelevant. As the court in *Tanners' Council* held, 540 F.2d at 1192, "[w]hatever methodological route is followed, the Administrator must nevertheless establish that the levels are achievable by the affected plants." This Court is faced with—and should resolve here—a clear conflict between the Fourth and Fifth Circuits.

Also unavailing is EPA's attempt to distinguish *Association of Pacific Fisheries* and *CPC International, Inc. v. Train*, 540 F.2d 1329 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). EPA Br. at 17-18. A fair reading of those cases indicates that, like the court in *Tanners' Council*, the courts in *Association of Pacific Fisheries* and *CPC*

International would not have upheld limitations where, as here, no plant using the EPA-designated technology can achieve all of the limitations. The decision of the court below is a substantial deviation from settled case law under the Clean Water Act, and should be reversed by this Court.

C. The Court Below Improperly Relieved EPA of Its Burden of Proof.

EPA does not deny that the Agency bears the burden of demonstrating that the limitations at issue here are achievable. *See, e.g., Association of Pacific Fisheries*, 615 F.2d at 817; *Tanners' Council*, 540 F.2d at 1192. The court below impermissibly relieved EPA of this burden, however, by adopting a legal "interpretation" of the Act that upheld limitations as achievable without requiring EPA to proffer either record evidence that the best plants can attain the limitations or the reasons why they cannot do so. For this reason, the decision of the Court below directly contradicts the District of Columbia Circuit's decision in *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980).[4] If allowed to stand, the decision of the court below would relieve EPA of the burden of demonstrating that effluent limitations are achievable.[5]

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[4] EPA attempts to distinguish *National Lime* from the instant case on the ground that the limitations at issue in *National Lime* were promulgated under Clean Air Act § 111. EPA Br. at 18 n.22. In fact, however, the standard for limitations promulgated under Clean Air Act § 111 is virtually identical to that for limitations promulgated under Clean Water Act § 304. *Cf.* Clean Air Act, 42 U.S.C. § 7411(a)(1) ("a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction . . . ") *with* Clean Water Act, 33 U.S.C. § 1314(b)(2)(A) ("such regulations shall identify . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable . . . ").

[5] EPA's brief at 15 states that where one technology is chosen as the best treatment technology for more than one pollutant, "there is . . .

Instead of attempting to defend the court's legal error, the Agency characterizes this Petition as a narrow factual attack on the record. EPA Br. at 12. The record itself is not in dispute, however. EPA's brief does not direct the Court to *any* record evidence indicating that any plant, much less both "best" plants or all affected plants, can comply with all of the steam stripping limitations through use of the EPA-designated technology, and, indeed, no such evidence exists. As noted in the Petition at 8 and uncontested in EPA's brief, the record fails to explain why PPG Plant 913 cannot comply with the chloroform limitation or how that plant can do so. Likewise, as noted in the Petition at 8-9 & n.2 and uncontested in EPA's brief, the record neither states why the TCE exceedance at Dow Plant 415 occurred nor contains a finding that the TCE exceedance was the result of either an upset or quality control problem.[6] To satisfy its burden of proof, EPA has an obligation to address these phenomena in the record. *National Lime*, 627 F.2d at 444. The baseless speculations of the Department of Justice and of the court below do not give rise to disputed issues of fact. Rather, they demonstrate that the court below impermissibly relieved EPA of its burden of proof.

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no reason why EPA should be required to identify a single plant as the best performer for both pollutants . . . . " PPG agrees. Consistent with *National Lime*, however, in a case such as this one, where both "best" plants properly use the model technology, either both "best" plants must be able to achieve the limitations or the record must demonstrate why they cannot do so.

[6] Indeed, as EPA knows, a steam stripper upset or quality control problem would necessarily have affected stripping performance for all compounds in the wastestream. Given Dow's excellent performance removing the seven other, far more prevalent compounds in its wastestream on the day in question (six compounds were stripped to below detection limits and the seventh to 20% of the OCPSF allowance for that pollutant), the TCE exceedance could not possibly have resulted from an operational problem or an upset.

D. The Case Law Upholding Averaging Is Inapposite Because PPG Does Not Challenge EPA's Methodology.

EPA's brief at pp. 13-14 claims that PPG asserts that it was inappropriate for EPA to average the data of the data base plants. A review of the Petition shows that PPG has not lodged any objection to data averaging or to any other methodology EPA employed to establish the OCPSF limitations. PPG challenges the result of EPA's rulemaking—unachievable steam stripping limitations—not the process by which the limitations were developed.[7]

II. ALL OCPSF PLANTS CAN BE EXPECTED TO EXCEED THE OCPSF LIMITATIONS AS A RESULT OF UNAVOIDABLE VARIABILITY.

Every circuit addressing the issue has held that, when EPA uses less-than-100% (*i.e.*, 99% and 95%) variability factors to establish effluent limitations, corresponding (*i.e.*, 1% and 5%) instances of unavoidable noncompliance are inevitable. *See* Pet. at 16 and citations therein. Contrary to the implication in EPA's brief at 19-20 & n.23, PPG

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[7] Neither *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) nor *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976), stand for the proposition that EPA may use data averaging to promulgate unachievable limitations. *See* EPA Br. at 13-14. In *Wyandotte*, the court rejected a challenge to the Agency's decision to average data after finding that the limits were achievable by seven plants in the *Wyandotte* data base and that the remaining three plants operated their pollution control systems in a "substandard" manner. 598 F.2d at 652. In *Hooker*, the court permitted EPA to average data from the "best existing" plants to set a BPT standard, but found that the best existing plants did not use BPT and that one plant in the data base in fact achieved the limitations. 537 F.2d at 632-33. In contrast, EPA here found that both PPG Plant 913 and Dow Plant 415 not only use BAT, but use it effectively, and neither plant—and thus no plant in the record—can comply with the steam stripping limitations. Whether EPA has averaged data or used some other methodology is irrelevant; EPA must nevertheless demonstrate that the limitations are "achievable by the affected plants." *Tanners' Council*, 540 F.2d at 1192.

does not claim that this result precludes EPA from using less-than-100% variability factors to establish effluent limitations. However, if EPA chooses to use less-than-100% variability factors, the Agency is required to provide an affirmative defense or otherwise account for the corresponding instances of noncompliance. *See Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977); *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976).[8]

EPA does not seriously dispute this obligation; instead, the Agency offers several arguments, each meritless, that purport to explain how the obligation is satisfied by the upset defense. EPA first asserts that the Agency could not distinguish upsets from non-upsets, and that the Agency did not edit data representing upsets from the data base. EPA Br. at 22 & n.28. These assertions are flatly contradicted by the record, which plainly and repeatedly states that EPA both identified upsets and deleted the corresponding data. *See, e.g.*, EPA's Responses to Comments, Pet. App. at 259a; 52 Fed. Reg. 42,522, 42,540 (1987). For example, as PPG's Petition explains, EPA conducted a careful, month-long study at Dow Plant

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[8] EPA argues that *FMC Corp.* and *Marathon Oil* are not inconsistent with the court's decision below, because those cases required only the creation of the upset defense. However, where, as here, EPA has expunged upsets from the data base prior to applying the variability factors, the upset defense will not apply to the data that fell above the 99 and 95 percentiles of the remaining data. *See* Pet. at 18. Therefore, the limitations at issue in this case suffer from the same malady that afflicted the limitations in *FMC Corp.* and *Marathon Oil*, an infirmity the upset defense cannot remedy. EPA's brief alternately suggests that the 1% and 5% instances of noncompliance represent "extreme" discharges, "poor performance," or "quality control problems" for which no defense is required. EPA Br. at 19, 20. However, as with upsets, EPA edited from the data base data reflecting quality control problems prior to the application of the variability factors. Therefore, just as the data that fell above the 99 and 95 percentiles could not have reflected upsets, that data could not have reflected improper operation.

415 in which the Agency monitored plant operations and collected all data. Similar studies were performed by EPA on numerous other plants. Although EPA excluded data from other plants, none of the Dow (or PPG) data were excluded. *See* Pet. at 8 n.2. EPA's attempt to discredit itself by denying in its brief what the Agency asserted in the record represents an unseemly effort to create a factual dispute where none exists.

Finally, EPA asserts that the upset defense applies to all exceedances beyond the control of the facility. EPA Br. at 23. By its very terms, however, that defense applies only to noncompliance caused by "exceptional incidents." 40 C.F.R. § 122.41(n)(1). Exceedances caused by EPA's use of less-than-100% variability factors will not result from "exceptional incidents," because EPA set the limitations using data reflecting only good, nonexceptional operation. *See* Pet. at 18. Therefore, the upset defense will not apply to the 1% and 5% unavoidable exceedances that result from EPA's use of the 99% and 95% percent variability factors.

CONCLUSION

The issues raised by this Petition are neither "narrow" nor "technical." EPA Br. at 12. Rather, this Petition was filed because the court below rejected *Tanners' Council* and found that a set of effluent limitations could be considered achievable even though no plant could achieve all of them; disregarded *National Lime* and relieved EPA of its obligation to either demonstrate that the best plants in the industry could achieve the limitations or explain why they could not do so; and ignored *Marathon Oil* and *FMC Corp.* and permitted EPA to base limitations on 99% and 95% variability factors without providing an affirmative defense or otherwise accounting for the corresponding 1% and 5% instances of unavoidable noncompliance. PPG's Petition for a Writ of Certiorari should be granted to resolve the conflict among the circuits and to correct

the fundamental legal errors committed by the court below.

Respectfully submitted,

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